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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 933

BANGOR AND AROOSTOOK RAILROAD COMPANY, *et al.*, and THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*, *Petitioners*,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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INDEX

Table of Contents

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	4
Statement of the Case	4
Reasons for Granting the Writ	14
A. The Congress Adopted the Provisions of the Railway Labor Act in P.L. 88-108, and That Act Governs the Situation Following the Expiration of Award 282	16
B. Under the Railway Labor Act, the Rights and Duties of the Parties to A Collective Bargaining Agreement or Arbitration Award Continue After Its Expiration Date Until Changed in Accordance With the Act	20
C. Under the Railway Labor Act, Disputes as to the Meaning or Application of an Arbitration Award Are for the Arbitration Board to Decide	27
D. Under the Railway Labor Act, the Purpose and Effect of an Expiration Date in A Collective Bargaining Agreement or Arbitration Award Is to Preclude the Parties From Being Required Under the Act to Bargain Prior to Such Expiration Date About Proposed Changes in Such Agreement or Award	36
E. The Issues Involved Are Important and Should Be Reviewed by This Court	40
Conclusion	43

TABLE OF CITATIONS

Cases:

	Page
Brotherhood of Locomotive Eng. v. *Baltimore & Ohio R. Co.*, 310 F. 2d 503 (7th Cir., 1962), aff'd, 372 U.S. 284 (1963)	4, 28
Brotherhood of Loc. Fire. & Eng. v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11 (D. D.C., 1964), aff'd *per curiam*, 331 F. 2d 1020 (D.C. Cir., 1964)	5, 18, 30
Brotherhood of Railroad Trainmen v. *Certain Carriers, Etc.*, 349 F. 2d 207 (D.C. Cir., 1965)	29
Brotherhood of Rail. Trainmen v. *Chicago, M., St. P. & P. R. Co.*, 380 F. 2d 605 (D.C. Cir., 1967)	29
Brotherhood of Railroad Train. v. *Chicago, M., St. P. & P. R. Co.*, 345 F. 2d 985 (D.C. Cir., 1965)	29
Brotherhood of Rail. Train. v. *Terminal R. Ass'n. of St. L.*, 380 F. 2d 584 (D.C. Cir., 1967)	29
Brotherhood of R. Trainmen v. *St. Louis Southwestern Ry. Co.*, 380 F. 2d 603 (D.C. Cir., 1967)	29
Capitol Airways, Inc. v. *Air Line Pilots Ass'n*, 41 CCH Labor Cases ¶ 16,739 (MD Tenn., 1961)	38
Enginers v. *Chicago, R. I. & P. R. Co.*, 382 U.S. 423 (1966)	33
Felter v. *Southern Pacific Co.*, 359 U.S. 326 (1959)	21
Flight Engineers' Inter. Ass'n v. *American Airlines, Inc.*, 303 F.2d 5 (5th Cir., 1962)	37
Labor Board v. *American Ins. Co.*, 343 U.S. 395 (1952)	27
Locomotive Engineers v. *B. & O. R. Co.*, 372 U.S. 284 (1963)	5, 27
Manning v. *American Airlines, Inc.*, 329 F. 2d 32 (2d Cir., 1964)	21, 22, 25
Mid-Continent Airlines v. *Brotherhood of Railway, Etc.*, 83 F. Supp. 976 (W.D. Mo., 1949)	28
Missouri Pacific R. Co. v. *Norwood*, 283 U.S. 249 (1931)	33
New York C. & St. L. R. Co. v. *Brotherhood of Loc. Fire. & Eng.*, 358 F. 2d 464 (6th Cir., 1966)	29
Order of Railroad Telegraphers v. *New York Central R. Co.*, 181 F. 2d 114 (2d Cir., 1950)	28

Page

Railroad Passenger Train Deficit, 306 I.C.C. 417 (1959) 4
Railway Clerks v. *Florida E.C.R. Co.*, 384 U.S. 238 (1966) 20, 26
Rutland Ry. v. *Brotherhood of Loc. Eng.*, 307 F. 2d 21 (2d Cir., 1962) 38
St. Louis S.F. & T. Ry. Co. v. *Railroad Yardmasters of America*, 328 F. 2d 749 (5th Cir., 1964) 26
Southern Pacific Company v. *Brotherhood of Locomotive Firemen and Enginemen*, 56 CCH Labor Case ¶ 12,209 (D.C. Cir., 1967) 13
Telegraphers v. *Chicago & N.W. R. Co.*, 362 U.S. 330 (1960) 26
Union Pacific R. Co. v. *Price*, 360 U.S. 601 (1959) 20
United Indus. Wkrs. of Seafarers, Etc. v. *Board of Trustees*, 351 F. 2d 183 (5th Cir., 1965) 21
Westchester Lodge 2186, Etc. v. *Railway Express Agency, Inc.*, 329 F. 2d 748 (2d Cir., 1964) 25
Western Air Lines v. *Labor Commissioner*, 167 F. 2d 566 (9th Cir., 1948) 28

Statutes:

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1331 10
28 U.S.C. § 1337 10
28 U.S.C. § 2201 10
28 U.S.C. § 2202 10

Public Law 88-108:

Section 3 ..... 5, 6, 19, 39
Section 4 ..... 5, 10, 18
Section 6 19

Railway Labor Act:

Section 3 ..... 13, 37
Section 5 ..... 21, 28
Section 6 ..... 4, 20, 21, 22, 23, 24, 25, 26

Page

Section 7 ..... 5, 18, 21, 28
Section 8 ..... 5, 18, 21, 28
Section 9 ..... 18, 21, 28
Section 10 5

Oregon Laws, 1965, Chapter 462 42
Laws of Washington, 1967, Chapter 2, Sect. 1 42

Miscellaneous:

109 Cong. Rec. 16128 19
109 Cong. Rec. 16130 19
H. Rept. No. 713, 88th Cong., 1st Sess. 5
S. Rept. No. 459, 88th Cong., 1st Sess. 18, 40
H.J. Res. 565, 88th Cong., 1st Sess. 16, 17, 39
S.J. Res. 102, 88th Cong., 1st Sess. 16, 17, 39
Hearings on H.J. Res. 565, 88th Cong., 1st Sess. 17
Hearings on S.J. Res. 102, 88th Cong., 1st Sess. 17
Opinion of Neutral Members, 41 Labor Arbitration 680 (1963) 6, 7, 30, 31, 35

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BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on July 31, 1967.

Opinions Below

Petitioners are 181 railroads which filed a complaint for declaratory judgment and injunctive relief against respondent in the United States District Court for the District of Columbia Circuit.[1] The opinion of that court is reported at 253 F. Supp. 682 and is set forth in Appendix A hereto.

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[1] A complaint filed by respondent in the Northern District of Illinois against 16 of the petitioners was transferred to the District of Columbia and consolidated with the proceeding brought by petitioners.

Both sides appealed from the judgment of the District Court, and those appeals were heard and decided together in an opinion dated May 12, 1967 and a supplemental opinion dated July 31, 1967.[2] Those opinions have not yet been officially reported, but are unofficially reported at 55 CCH Labor Cases ¶ 11,912 and 56 CCH Labor Cases ¶ 12,095, and are set forth in Appendices B and C hereto.

Jurisdiction

The judgment of the Court of Appeals, set forth in Appendix D hereto, was entered on July 31, 1967. A timely petition for rehearing and for clarification was denied on September 21, 1967 in a memorandum and order, set forth in Appendix E hereto, which also modified the supplemental opinion of July 31, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Article II of the Award by Arbitration Board No. 282 (Appendix F hereto) pursuant to Public Law 88-108 (77 Stat. 132) provided, among other things, that all "agreements, rules, regulations, interpretations, and practices, however established, with respect to the employment of firemen (helpers) shall continue undisturbed except as modified by the terms of this Award." Under the "terms of this Award," the carriers were authorized to eliminate up to 90% of all firemen's assignments on diesel freight and yard locomotives, among other things. The period during which Article II of the Award "shall continue in force" expired as of the end of March 30, 1966:

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[2] Those opinions also relate to appeals from another District Court proceeding between the carriers and certain other unions which involved the crew-consist aspects (Article III) of Award 282. Petitions for writ of certiorari from the judgment in that case have been filed by both the carriers and the unions, and are now pending as Nos. 861, 862 and 863.

1. Do the rights and duties of the parties under Article II of the Award apply, unless and until changed in accordance with the Railway Labor Act, to "new runs" created after expiration of the Award and in states in which valid so-called "full crew" laws are repealed after expiration of the Award as well as in all other circumstances?

(a) Did Article II of the Award directly modify the prior rules and agreements governing the employment of firemen or did it establish a procedure for modifying such prior agreements and rules?

(b) Does Arbitration Board No. 282 have primary jurisdiction to determine issues as to the meaning and application of its Award, including the issue stated in 1(a) above?

(c) If Article II of the Award is interpreted as establishing a procedure for modifying the prior rules and agreements, does it nevertheless affect "rates of pay, rules, or working conditions" within the meaning of those terms as used in the Railway Labor Act so that such procedure continues to apply after expiration of the Award until changed in accordance with that Act?

(d) Were the prior rules and agreements modified by or pursuant to Article II of the Award in states which had valid so-called "full crew" laws, so that such rules and agreements as modified by or pursuant to the Award apply to the use of firemen after repeal of the "full crew" laws?

2. Could a union party to the Award serve carrier parties to the Award with notices of proposed changes in rules and agreements governing the employment of firemen and require the carriers to bargain upon such notices during the period prior to the expiration of the Award, when such notices proposed that the changes become effective after the expiration of the Award, or were those notices premature so as not to become effective under Section 6 of the Railway Labor Act until after the expiration of the Award?

Statutes Involved

Public Law 88-108 and relevant provisions of the Railway Labor Act are set forth in Appendix H hereto.

Statement of the Case

In 1959, the overmanning of trains resulting from obsolete work rules having little or no relation to actual manpower needs in the light of technological developments constituted a serious problem. See *Brotherhood of Locomotive Eng.* v. *Baltimore & Ohio R. Co.*, 310 F.2d 503, 505-506 (7th Cir., 1962), aff'd, 372 U.S. 284 (1963); *Railroad Passenger Train Deficit*, 306 I.C.C. 417, 480 (1959). On or about November 2, 1959, in an effort to overcome this problem, most of the nation's railroads served the unions representing their operating employees with notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156). While a number of proposals were made, the two relevant here sought, in general, to eliminate all rules requiring the use of firemen on diesel locomotives in freight and yard service and all rules which required the use of a stipulated number of trainmen (such as brakemen and helpers) in road and yard service, and to leave those matters to managerial discretion. On or about September 7, 1960, the unions served the railroads with Section 6 notices of counterproposals which, among other things, would generally require the use of a fireman on all locomotives and the use of two brakemen or helpers on all road and yard crews. JA 59-60, 74.

A Presidential Railroad Commission was appointed by the President on an *ad hoc* basis to investigate the dispute and use its best efforts to bring about a settlement (JA 61, 74). In its February 26, 1962 Report to the President, the Commission recommended generally (p. 7) that "the rules governing the manning of engines and trains and the

assignment of employees be revised to permit the elimination of unnecessary jobs and at the same time to safeguard the interests of the individual employees adversely affected." Detailed recommendations in that regard were made (Report, at 35-50, 53-60) and were accepted by the carriers, but rejected by the unions. H. Rept. No. 713, 88th Cong., 1st Sess., 7. After the validity of the carriers' proposals was upheld in litigation brought by the unions, *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963), the President appointed an emergency board under Section 10 of the Railway Labor Act (45 U.S.C. § 160). The recommendations of Emergency Board No. 154 generally paralleled those of the Commission, and were accepted by the carriers and rejected by the unions. H. Rept. No. 713, *supra* at 7.

The report by the emergency board exhausted the procedures of the Railway Labor Act and, following the expiration of 30 days, the carriers were free to implement their proposals and the unions were free to strike or engage in other self help. *Locomotive Engineers* v. *B. & O. R. Co.*, *supra* at 291. When it became apparent that a disastrous nationwide railroad strike was imminent, the President proposed preventive legislation and the Congress responded by enacting Public Law 88-108 (77 Stat. 132). Under that legislation, the two key issues concerning the rules governing the use of firemen and train crew consists were submitted to arbitration in accordance with the procedures established by Sections 7 and 8 of the Railway Labor Act (45 U.S.C. §§ 157, 158), and the arbitration award was to constitute a "complete and final disposition" of the portions of the Section 6 notices raising those issues (P.L. 88-108, §§ 3, 4). The validity of the Award by Arbitration Board No. 282 was upheld in *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11 (D. D.C.,

1964), aff'd *per curiam,* 331 F.2d 1020 (D.C. Cir., 1964).

With respect to the crew-consist issue, Article III of the Award (App. F, at 74-79) did not directly modify the existing rules stipulating the consist of train crews. Rather, Article III established a procedure for modifying such rules whereby, in general, written notice could be given of proposed changes in the rules, the interested carrier and union conferred and attempted to reach agreement upon any changes to be made, and either party could submit the dispute to a special board of adjustment for final decision pursuant to "guidelines" specified in the Award if no agreement was reached. Thus, Paragraph III-A(2) provided (*id.,* at 74-75) that: "No change shall be made in the scope or application of rules in effect immediately prior to the effective date of this Award . . . which require a stipulated number of trainmen . . . in any class of road service . . . , or which require a stipulated number of brakemen or helpers in any class of yard, transfer, or belt line service . . . , except by agreement, or pursuant to the provisions of this Award." Article III also provided that trainmen in active service as of the effective date of the Award were to be retained in road or yard service until they retired, were discharged for cause or otherwise were removed from employment by natural attrition.

Section 3 of P.L. 88-108 required Board 282 to "give due consideration to those matters on which the parties were in tentative agreement," and the crew-consist provisions of the Award were largely patterned "both in matters of approach and in matters of substance" after what the parties had tentatively agreed upon in their negotiations prior to enactment of the statute. *Opinion of Neutral Members,* 41 Labor Arbitration 680, 696 (1963). There was "no substantial structure of agreement . . . concerning the proposed elimination of firemen's jobs," however, and the

Board had to develop its own approach to that issue. *Id.*, at 686. The Board considered and rejected an approach —similar to that adopted in Article III as to crew consists —whereby a procedure for modifying firemen's rules would be established as the Neutral Members were "convinced that the arbitration of disputes over the need for firemen in road freight and yard service on a case-by-case basis on each railroad, even if legally permissible, would simply not be administratively feasible." *Id.*, at 690. But the Neutral Members agreed with the Presidential Railroad Commission "that firemen-helpers are not so essential for the safe and efficient operation of road freight and yard diesels that there should continue to be either a national rule or local rules requiring their assignment on all such diesels" (*id.*, at 688), and they believed that by "allowing the firemen's organizations sole discretion to decide that firemen must be used in up to ten per cent of all crew assignments which the carrier has already concluded can be performed safely and efficiently without firemen, . . . we have provided a sufficient margin for error" (*id.*, at 691).

Accordingly, Article II of the Award (App. F, at 68-74) provided, in Paragraph A(1), that all "agreements, rules, regulations, interpretations, and practices, however established, with respect to the employment of firemen (helpers) shall continue undisturbed except as modified by the terms of this Award," and further provided, in Parts B, C and D the manner in which the prior agreements and rules were "modified by the terms of this Award." Paragraph B(1) provided for a listing by the carriers, within 7 days after the effective date of the Award, of "pool and regularly assigned freight engine crews" and "regularly assigned yard engine crews" on which, in the carrier's judgment, firemen were not needed. Paragraph B(2) authorized the union to veto 10% of the crews thus listed (within each

seniority district) within 30 days after receipt of the carriers' lists. Paragraph B(3) provided that, at three-month intervals thereafter, supplemental lists of all "pool and regularly assigned freight engine crews and of regularly assigned yard engine crews which have been established or discontinued in each seniority district during the preceding 3 months" shall be served by the carriers and for readjustment of the union's vetoes in the light of such supplemental lists. Paragraph B(4) provided that the union's general chairmen are to receive copies of the carriers' lists, and Paragraph B(5) provided that:

> "After the expiration of 37 days following the effective date of this Award, the carrier shall not be required to use firemen (helpers) on other than steam power in any class of freight service (including all mixed, miscellaneous, and unclassified services) or in any class of yard service (including all transfer, belt line, and miscellaneous yard services), other than in crews designated by the local chairman, pursuant to the provisions of paragraphs B(2) and B(3) of this Award, except as may be necessary to provide jobs for firemen (helpers) whose employment rights are retained as provided in Parts C and D of this Award; provided that no yard locomotive shall be operated without a fireman (helper) unless and until it is equipped with a deadman control in good operating condition."

On its face, therefore, Part B directly modified the National Diesel Agreement which had required the use of a fireman on all locomotives and established a new rule, commencing 37 days after the effective date of the Award, as to when firemen must be used on diesel freight and yard locomotives. Paragraph B(5) states flatly that firemen

need not be used on such locomotives, except in three situations: (1) crews vetoed by the union, (2) where necessary to provide engine-service employment to "protected" employees entitled thereto by Parts C and D of the Award; and (3) when yard engines are operated without a deadman control in good operating conditions.[3]

Parts C and D of Article II provided protections for the firemen then employed. In general, firemen who had less than two years seniority as of the effective date of the Award could be separated from employment upon the payment of substantial separation allowances, those with between two and ten years seniority could be offered comparable jobs (with five-year guarantees against any reduction in wages and the payment of relocation expenses) and separated from employment upon the payment of substantial separation allowances if they refused such job offers, and those with more than ten years seniority were to be retained in engine service until they retired, were discharged for cause or otherwise were removed from employment by natural attrition. The carriers have reduced the number of firemen employed by about 18,000, provided comparable jobs to some 1200 former firemen, paid some $36,000,000 in separation allowances, and realized savings (as of December 1, 1965) of about $179,000,000, through application of Article II of the Award (JA 132).

Part E of Article II provided for the establishment of a National Joint Board "charged with responsibility for making an extensive and continuing study of the experience

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[3] Of course, in the event (rare, if not non-existent) a carrier did not list a crew because in its judgment a fireman was needed, the carrier thereby agreed to use a fireman on that crew. But, "errors of omission" in the listing of crews could be corrected within a reasonable period, so Board 282 ruled. Answer on September 16, 1965 to BLF&E Question No. 135 (App. G hereto, at 82).

in road freight and yard service with and without the employment of firemen (helpers) during the period that this Award remains in effect," and to "issue to the parties a report based on its study" within three months of the expiration of the Award. In the Report of the National Joint Board, issued on January 5, 1966, the majority concluded that the elimination of firemen had not resulted in an undue work burden on other employees (p. 18-33); that the earnings of firemen retained in employment generally had increased and instances of actual hardship upon individual firemen as a result of application of the Award were rare (pp. 34-63); and that the elimination of firemen had not adversely affected safety of operations (pp. 64-102) or efficiency of operations (pp. 103-120).

Section 4 of P.L. 88-108 provided that Award 282 "shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise." Article IV of the Award (App. F, at 79) provided that the "Award shall continue in force for two years from the date it takes effect, unless the parties agree otherwise." March 30, 1966 was the last day of that two-year period insofar as the firemen's provisions of the Award are concerned (JA 67, 74). Shortly prior to that date, petitioners filed their complaint for a declaratory judgment and injunctive relief (JA 43-73). The jurisdiction of the District Court was grounded upon 28 U.S.C. §§ 1331, 1337, 2201 and 2202. On March 28, 1966, petitioners obtained a temporary restraining order against strikes by respondent over any dispute as to the rules to be applied after expiration of the Award (JA 96-97), but respondent nonetheless struck 12 of the railroads, including some of the largest, in the early morning hours of March 31, 1966, which strikes were specifically enjoined by a supplement to the temporary restraining order (JA 98-100).

On or about November 15, 1965, respondent served most of petitioners, under Section 6 of the Railway Labor Act, with a notice relating to the subject matter of the Award. That notice was divided into three parts, identified as "Notice No. 1," "Notice No. 2," and "Notice No. 3", and requested that the proposals made therein be adopted effective upon the expiration of the Award. Petitioners took the position that those notices were premature, because served prior to expiration of the Award, and were otherwise invalid. JA 132-134, 144-166.

In its judgment entered on May 12, 1966 (JA 231-237), the District Court ruled, among other things, that: (1) petitioners could not terminate the employment of firemen or offer comparable jobs thereto under Part II-C of the Award after the expiration of the Award; (2) with that exception, the agreements and rules in effect prior to the Award were not restored upon expiration of the Award, and the modifications in such agreements and rules made by or pursuant to the Award (including the provisions for protection of existing employees) continued to apply until changed in accordance with the Railway Labor Act; and (3) the notices served by respondent under Section 6 of the Railway Labor Act were premature and could not become effective until the day after the expiration of the Award. The judgment enjoined respondent from striking petitioners over, in general, actions or refusals to act which were authorized by the judgment.

Both sides appealed. The Court of Appeals reversed the first and third of those rulings.[4] With respect to the

[4] The position of the Court of Appeals with respect to the first ruling is not entirely clear. In footnote 2 to its supplemental opinion, the court stated (App. C, at 56) that the "work rules effectuating the changes made under the Award included the ancillary protective provisions of Part II-C for individuals transferred or separated in implementing the change" and that those "work rules continued in effect after the Award." Since Part C of Article II contains the provisions permitting certain firemen to be

second ruling described above, the Court of Appeals agreed in principle with the views of the District Court. But, it concluded that the provisions in Part B of Article II of the Award established procedures for modifying the prior rules and agreements, rather than in themselves modifying such rules and agreements, and that such procedures could not be utilized after expiration of the Award. In consequence, the Court of Appeals held that the prior rules and agreements applied so as to require the use of firemen on "new runs" created after expiration of the Award and in states where valid "full crew" laws requiring the use of a fireman on each locomotive were repealed after expiration of the Award.

The interpretation of the Award by the court below as establishing a procedure for modifying the prior agreements and rules, rather than directly modifying those agreements and establishing new rules governing the use of firemen, not only is contrary to the plain language of the Award, but had not been suggested by respondent [5] or

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separated from employment or offered comparable jobs, the court thus seems to have held that the District Court erred in holding that petitioners could not implement those provisions after expiration of the Award. An ambiguity was created, however, by another statement in the supplemental opinion by the Court of Appeals (App. C, at 55) that "a carrier is not only prevented from taking "affirmative acts" under the Award to reduce the use of firemen, as the District Court properly held, but . . . ." The District Court had grounded its ruling that Part C could not be implemented after expiration of the Award upon the "affirmative acts" theory referred to by the Court of Appeals. In their petition for rehearing and clarification, the carriers pointed out this ambiguity and their reasons for believing that the Court of Appeals intended to hold that the District Court erred. Since the Court of Appeals did not clarify the matter (see App. E, at 64-65), it apparently agreed with petitioners' interpretation of its supplemental opinion.

[5] Indeed, in another case pending in the Court of Appeals at the same time, respondent was contending that the operation of a locomotive without a fireman in a situation where the carrier had inadvertently failed to list the crew under Paragraph B(3) of the Award constituted a violation of the Award, rather than the National Diesel Agreement, and that, conse-

anyone else and is inconsistent with interpretations by Board 282 of its Award. Moreover, Board 282 had ruled that crews in "full-crew law states" were subject to the "listing" and "vetoing" provisions of the Award, which actions would have established new "work rules" that continue after expiration of the Award even under the principles stated by the Court of Appeals. And, as that court had previously held, disputed issues as to the meaning of the Award were for Board 282 rather than the courts to decide. See pp. 27-36, *infra*.

These and other pertinent considerations were brought to the attention of the Court of Appeals by petitioners in their petition for a rehearing and for clarification. That petition was denied, "without prejudice, however, to the Board's [Arbitration Board No. 282] seeking leave within thirty days from the date of this order to submit as amicus curiae a showing of respects, if any there be, in which the opinions of this court are inconsistent with the understanding of Board 282 as to the proper meaning and applicability of its award" (App. E, at 64-65). In addition the Court modified its prior supplemental opinion to hold that the listing of crews in "full-crew" law states was "conditional" so as to modify the National Diesel Agreement only if such laws were repealed during the period of the

quently, neither Section 3 of the Railway Labor Act (45 U.S.C. § 153) nor the claims-and-grievance procedure established by the parties were applicable to individual claims growing out of such a violation. *Southern Pacific Company* v. *Brotherhood of Locomotive Firemen and Enginemen*, No. 20,378. The carrier agreed in that case that a violation of the Award was involved, and urged that Section 3 and the claims-and-grievance procedure applied nevertheless. But, of course, if the National Diesel Agreement is modified only by the carriers' actions in listing crews under Paragraphs B(1) and B(3), rather than by the Award itself, the failure to use a fireman on an unlisted crew would violate the National Diesel Agreement rather than the Award. Nevertheless, in an opinion in that case issued on October 6, 1967 (56 CCH Labor Cases ¶ 12,209), the Court of Appeals held that violations of the Award were involved, without mentioning its inconsistent opinion in this case. A petition for rehearing is pending.

Award (App. E, at 65). On October 19, 1967, Board 282 advised the Clerk of the Court of Appeals (over the dissent of its carrier members) that:

> "Exercising the discretion granted by the U.S. Court of Appeals for the D.C. Circuit in its memorandum of September 21, 1967, in Cases No. 20192, 20193, 20215, and 20216, Arbitration Board 282 respectfully declines to submit any statement concerning whether the opinions of the Court are either consistent or inconsistent with the understanding of Board 282 as to the proper meaning and applicability of its Award."

Thus, the Board did not consider whether or not it agreed with the Court's interpretation of the Award, and simply declined to request leave to make an *amicus* submission in that regard. In view of that refusal, the carriers immediately submitted questions to Board 282 raising the disputed issues as to the interpretation of the Award, as the Board has no "discretion" to refuse to answer questions of interpretation put to it by the parties, which questions are now pending. The carriers also moved the Court of Appeals to vacate its denial of their petition for rehearing and to stay the proceedings pending Board 282's answer to those questions, which motion was denied on November 9, 1967.

Reasons for Granting the Writ

In P.L. 88-108, the Congress provided for arbitration of the firemen and crew-consist issues raised by the 1959 and 1960 Section 6 notices in accordance with the provisions of the Railway Labor Act. One must look to the Railway Labor Act, therefore, to determine the consequences of the expiration of the two-year period in which the arbitration award remained in effect. This generally

was recognized by the court below and it correctly held that the modifications in substantive work rules made by or pursuant to Award 282 continued to apply after the expiration of the two-year period by virtue of the Railway Labor Act until changed in accordance with that Act. But that court erred in holding that the National Diesel Agreement, which was modified by the Award, nevertheless applies to all "new runs" created after expiration of the Award and in states where valid "full crew" laws are repealed after expiration of the Award, so as to require the use of a fireman on all such "new runs" and on all locomotives in such states.

In reaching that erroneous result, the court not only misinterpreted the plain language of the Award, but also ignored the established rule that disputed issues as to the meaning of arbitration awards under the Railway Labor Act are for the arbitration board rather than the courts to decide and failed to recognize that, even if the Award were correctly interpreted as establishing procedures for changing prior agreements and rules governing the employment of firemen, such procedures continue by virtue of the Railway Labor Act until changed in accordance with that Act. In addition, the court erred in holding that the carriers were required to bargain prior to the expiration of the Award upon Section 6 notices relating to the subject matter of the Award, and thus in failing to recognize that under the Railway Labor Act the effect of an expiration date in a collective bargaining agreement or arbitration award is to establish a moratorium during which the parties cannot be required to bargain about proposed changes in such an agreement or award.

These erroneous rulings will require the use of firemen in situations where the Presidential Railroad Commission, Emergency Board No. 154 and Arbitration Board No. 282 all concluded that firemen were not needed, and thus are important to the general public as well as to the parties

since the unnecessarily increased operating costs to the railroads—which already are financially hard pressed—will eventually affect the rates charged for rail transportation. And, the issues presented are important to the administration of the Railway Labor Act and conflict in principle with decisions by this Court and other courts. Consequently, we believe that the rulings below with respect to those issues deserve review by this Court.

A. *The Congress Adopted the Provisions of the Railway Labor Act in P.L. 88-108, and that Act Governs the Situation Following the Expiration of Award 282.*

As we briefly demonstrate below, the Congress integrated its disposition of the fireman and crew-consist disputes arising out of the 1959 and 1960 Section 6 notices into the normal processes of the Railway Labor Act by providing for arbitration of those issues in accordance with the arbitration provisions of that Act. Hence, a determination of the effects of the expiration of the two-year period of the Award by Arbitration Board No. 282 basically involves an interpretation of the Railway Labor Act.

When a nationwide railroad strike was threatened following exhaustion of the procedures of the Railway Labor Act with respect to the Section 6 notices served in 1959 and 1960 (see pp. 4-5, *supra*), the President urged that the Congress act to prevent such a disaster and his Administration submitted a bill (H.J. Res. 565 and S.J. Res. 102, 88th Cong., 1st Sess.) for that purpose. The Administration's bill provided for regulation by the Interstate Commerce Commission of all the issues raised by the 1959 and 1960 Section 6 notices, through interim rules that would "remain operative until the parties reach agreement regarding the matter involved, or if no agreement is reached, for two years following the date the interim rule goes into

effect." The bill did not provide for disposition of the Section 6 notices. Rather, it provided for "continued collective bargaining" upon those notices and that, if no agreement was reached prior to expiration of the I.C.C. rules, the President should report to the Congress "and make such further recommendations, if any, as he deems appropriate, including his recommendation as to whether this joint resolution should be extended."[6]

Under the Administration's bill, therefore, the parties would have been required to continue bargaining upon the 1959 and 1960 Section 6 notices during the period of I.C.C. regulation; if no agreement disposing of the dispute was reached in that bargaining, the Section 6 notices would remain outstanding and the parties once again would be free to engage in self help upon expiration of the I.C.C. regulations unless additional legislation was enacted. This was confirmed by testimony in the committee hearings (which were exclusively devoted to the Administration's bill) by the Secretary of Labor and others. The Secretary acknowledged, however, that a nationwide railroad strike would be as intolerable at the later time when the I.C.C. regulations expired as it was then and believed that the President would recommend an extension of the legislation when he reported to the Congress as required by the Administration's bill, if the parties did not dispose of the dispute by agreement. See, *e.g.*, House Hearings, at 55-56, 59-60, 64-65, 69, 81, 107, 109, 114, 565; Senate Hearings, at 49-51, 54-56, 61, 63, 81, 364, 370-371, 375.

The congressional committees, however, were not satis-

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[6] The Administration's bill is set forth in the Hearings on H.J. Res. 565 before the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess. (hereinafter referred to as "House Hearings") at 1-3, and in the Hearings on S.J. Res. 102 before the Senate Committee on Commerce, 88th Cong., 1st Sess. (hereinafter referred to as "Senate Hearings"), at 1-3.

fied with the Administration's bill. They did not share the Administration's optimism that an agreement disposing of the dispute would be reached during the period of I.C.C. regulation, and they believed (S. Rept. No. 459, 88th Cong., 1st Sess., at 10) that:

> "A failure to provide for a complete solution which would terminate the dispute at this time might well result in the necessity for a resumption of Congressional activity in a few months time. The committee has sought to avoid this possibility, both because of its distaste for legislating solutions to labor-management disputes and because of the obvious dangers of repeated congressional intervention in this field."

Accordingly, the committees revised the bill so as to "adopt the time-tested provisions of the Railway Labor Act" (*id.*, at 3) in disposing of the key issues in dispute, and it was the bill as thus revised which was enacted by the Congress.

Thus, P.L. 88-108 did not provide for I.C.C. regulation, but (§ 4) for arbitration of the crew-consist and firemen issues which "shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act" to the extent possible, with the arbitration award being "made and filed as provided in said sections and . . . subject to section 9 of said Act." Under Sections 7 and 8 of the Railway Labor Act, the parties by agreement may submit labor disputes to binding arbitration. 45 U.S.C. §§ 157, 158. In the preamble to P.L. 88-108, the Congress noted that the parties had agreed in principle to arbitration of the disputes arising out of the 1959 and 1960 Section 6 notices, but had been "unable to agree upon the terms and procedures of an arbitration agreement." In effect, therefore, the Congress wrote an arbitration agreement for the parties. See *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B. & Q. R. Co.*,

225 F. Supp. 11, 18 (D. D.C., 1964), aff'd *per curiam*, 331 F.2d 1020 (D.C. Cir., 1964). In addition, P.L. 88-108 omitted the requirement in the Administration's bill for continued collective bargaining upon the crew-consist and firemen aspects of the 1959 and 1960 Section 6 notices,[7] and provided instead (§ 3) that the award by the arbitration board would constitute a "complete and final disposition" of those aspects of the Section 6 notices.[8]

By thus adopting the "time-tested provisions of the Railway Labor Act, the Congress must have intended that the situation following the expiration of the two-year period of Award 282 should be the same as that which follows the expiration of a collective bargaining agreement or arbitration award arrived at under the Railway Labor Act. As the floor manager (Representative Harris) of the legislation explained in the House debates: "The resolution provides that on the two major issues, the order of the arbitration board would be in force for a period of 2 years. Then the issues go back under the regular established procedure of collective bargaining." 109 Cong. Rec. 16128; see, also, *id.*, at 16130. Of course, the "regular established procedure of collective bargaining" in the railroad industry is provided by the Railway Labor Act. This principle was recognized by the court below, which stated, among other things, that (App. B, at 27): "In essence

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[7] Section 6 of P.L. 88-108 provided for a resumption of collective bargaining upon the aspects of the Section 6 notices other than those raising the firemen and crew-consist issues, and they were disposed of by an agreement entered into on June 25, 1964 (JA 65, 74).

[8] In thus disposing of the Section 6 notices, the Congress avoided the situation which would have existed under the Administration's bill following the expiration of the I.C.C. regulations whereby those notices would have remained outstanding (unless disposed of by agreement) so as to permit the parties to engage in self help with respect thereto. Hence, no one contends that upon expiration of Award 282 the carriers could implement their 1959 Section 6 notices or that the unions could strike to coerce acceptance of the proposals in their 1960 Section 6 notices.

then we have a mechanism tantamount to an arbitration agreement, albeit one drafted by Congress, that confers on the arbitrator the power to impose a settlement binding for up to two years. It becomes appropriate, then, to consider what would have been the rights and duties of the parties if they had themselves written the arbitration agreement."

B. *Under the Railway Labor Act, the Rights and Duties of the Parties to A Collective Bargaining Agreement or Arbitration Award Continue after Its Expiration Date until Changed in Accordance with the Act.*

While the Railway Labor Act does not require agreement upon proposed changes in rates of pay, rules or working conditions, it provides procedures that "are purposefully long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238, 246 (1966). The Act thereby provides "a framework for peaceful settlement of labor disputes between carriers and their employees to 'insure to the public continuity and efficiency of interstate transportation service, and to protect the public from the injuries and losses consequent upon any impairment or interruption of interstate commerce through failures of managers and employees to settle peaceably their controversies.' H.R. Rep. No. 328, 69th Cong., 1st Sess., p. 1." *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, 609 (1959).

The keystone of the procedures thus established is the requirement in Section 6 that a carrier or union "shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions. . . ." It is the service of such a notice which calls into play the further requirements for conferences,

mediation by the National Mediation Board, a proffer of voluntary arbitration, and, in the President's discretion, an investigation by an emergency board. 45 U.S.C. §§ 155-160. The disputes thus created are settled either by a new collective bargaining agreement or by an agreement to submit the dispute to binding arbitration under Sections 7 and 8 of the Act. If either party subsequently desires to change the new agreement or the arbitration award pursuant to the arbitration agreement, the procedures required by the Act must be reinstituted through the service of another Section 6 notice.

Obviously, the parties should not be permitted to short circuit this statutory procedure and put themselves into a position to strike or engage in other self help without exhausting that procedure, merely by providing in a collective bargaining agreement or arbitration award that it shall terminate on a specified date. Cf., *Felter* v. *Southern Pacific Co.*, 359 U.S. 326, 336 (1959). Rather, as was held in *Manning* v. *American Airlines, Inc.*, 329 F.2d 32, 34 (2d Cir., 1964), the "effect of § 6 is to prolong agreements subject to its provisions regardless of what they say as to termination," until they are changed pursuant to new Section 6 notices and the other procedures required by the Act. See, also, *United Indus. Wkrs. of Seafarers, Etc.* v. *Board of Trustees*, 351 F.2d 183, 190, fn. 26 (5th Cir., 1965).

This basic principle was recognized by the court below. In its initial opinion, that court rejected the unions' contention that the rules and agreements in effect prior to Award 282 automatically were restored upon expiration of the Award, because (App. B, at 22-23):

> "We think the mere limitation of the effective period of the Award neither implies nor compels the construction the unions seek. Our ruling is that the work rules created by the Award constituted a new

plateau that was not automatically eroded when the Award expired. The legal underpinning for our ruling is not the Joint Resolution, which expired after 180 days of life—except insofar as necessary to sanction the Award. The ruling is not based on the Award, which had only a 2-year life, or on any agreement of the parties. The predicate of our ruling is, simply, the force of the Railway Labor Act. Certain work rules were in force on [the day the Award expired]. The mandate of the Railway Labor Act requires that the work rules in effect on any particular day shall also be in effect the following day—beyond the power of either party to institute a unilateral modification —subject to change only in accordance with the procedures prescribed by the Act. These procedures begin with the notices required by Section 6 to be served by any party seeking a change at least thirty days in advance of the proposed effective date of such change. This new-plateau reasoning applies even though the work rules are established by agreements of limited duration. 'The effect of § 6 is to prolong agreements subject to its provisions regardless of what they say as to termination.' [Citing *Manning* v. *American Airlines, Inc.*, 329 F.2d 32, 34 (2d Cir., 1964.] It likewise applies even though the work rules are established by an arbitration award of limited duration."

This ruling was clearly correct insofar as it held that the rules established by or pursuant to Award 282 continued to apply after expiration of the Award, by "force of the Railway Labor Act," until changed in accordance with that Act. But the Court's use of the term "work rules" gave some reason to believe that the court had a mistaken impression of the scope of Section 6 which applies

not just to changes in "rules," but to changes in "agreements affecting . . . rules. . . ." Unlike the situation with respect to the crew-consist provisions of the Award which everyone recognized as establishing a procedure for changing the prior crew-consist agreements and rules,[9] such a mistake did not appear to be of any significance insofar as the firemen's provisions of the Award are concerned; those provisions on their face directly established new rules governing the employment of firemen and no one had contended that they merely established a procedure for modifying the prior agreements and rules (see pp. 7-9, 12-13, *supra*).[10]

In its supplemental opinion, the court below reaffirmed its view that (App. C, at 52-53) "the work rules resulting from the Award . . . endure, by virtue of the Railway Labor Act; they are deemed to be incorporated into the prior agreements of the parties that themselves endure by virtue of the Railway Labor Act unless and until changed in accordance with that statute." But that court not only went on to hold that the procedures established by the crew-consist provisions of the Award for changing prior crew-consist agreements and rules could not be utilized after expiration of the Award, it also unexpectedly concluded that Part II-B of the Award, providing for the listing and vetoing of regular firemen's assignments and the circumstances in which firemen must be used by the carriers,

[9] See the petition for writ of certiorari now pending in this Court as No. 863.

[10] In its initial opinion (App. B, at 44), the court below directed the parties "to submit within 10 days a proposed judgment" at which time they also could "request supplemental rulings on any matters that have not been discussed in this opinion." The Court's supplemental opinion followed those submissions. None of the parties, in their respective submissions, contended that Part II-B of the Award established a procedure for modifying the National Diesel Agreement rather than directly modifying that Agreement and establishing new work rules governing the use of firemen.

should be interpreted as establishing "procedures for establishing new work rules" which "procedures, like the procedures for changing substantive work rules for crew consists of trainmen, had no effectiveness after the expiration of the Award" (App. C, at 54-55). Although recognizing "that it may be turning back the clock to an era that two presidential boards and the Neutral Members of Board 282 have agreed is technologically outdated," by reason of that conclusion the court saw "no alternative to holding that any new runs created after Award 282 are subject to the National Diesel Agreement, and its requirement of a fireman on each engine crew" (App. C, at 56). And, the court further held, upon the basis of that conclusion, that the National Diesel Agreement would apply to require the use of a fireman on all locomotives in states where valid "full crew" laws are repealed after expiration of the Award because such repeals would occur "after expiration of the power of a carrier to invoke the procedures of the Award" (App. C, at 57).

We will show (pp. 27-36, *infra*) that the court below erred in interpreting Part II-B of the Award as establishing a procedure for changing the National Diesel Agreement and other prior agreements and rules governing the use of firemen, rather than as directly establishing new rules. But even if that interpretation is correct, the court erred in its holdings based thereon because of its misconstruction of the scope of Section 6 of the Railway Labor Act. Section 6 applies to "intended changes in *agreements affecting* rates of pay, *rules*, or working conditions" (emphasis added), and not merely to intended changes *in* rates of pay, rules, or working conditions. We think it obvious that a collective bargaining agreement (including an arbitration award pursuant to an agreement to arbitrate, to which Award 282 is equivalent) establishing a

procedure for changing rules governing the use of firemen or other substantive "work rules" is one "affecting . . . rules," which can only be changed pursuant to Section 6.

We do not know of any other decision that has limited Section 6 to changes in substantive "work rules" (or substantive "rates of pay" and "working conditions") or even suggested that Section 6 should be so limited. Indeed, the *Manning* case which was relied upon by the court below did not involve a substantive "work rule," rate of pay or working condition, but a provision in an agreement establishing a procedure for the check-off of union dues, and the Second Circuit in that case held that the "effect of § 6 is to prolong *agreements* subject to its provisions regardless of what they say as to termination" (emphasis added). 329 F.2d, at 34. Conversely, where an agreement or arbitration award provides a procedure for changing existing rules, rates of pay or working conditions, such changes may be made pursuant to that procedure without resort to Section 6 and the other procedures established by the Act. Thus, in *Westchester Lodge 2186, Etc.* v. *Railway Express Agency, Inc.*, 329 F.2d 748 (2d Cir., 1964), the court rejected a contention that the *status quo* provisions of Section 6 applied to a dispute over the transfer of certain employees from one seniority district to another. This was so because the collective bargaining agreement established a procedure whereby such transfers could be brought about through "conference and agreement between the management and the duly accredited representatives of the employees," and the carrier contended that the transfers had been authorized pursuant to that procedure. As the court pointed out, "an agreement made pursuant to a specific contract provision designed to cover the situation cannot fairly be termed an alteration of the collective agreement" so as to be subject to Section 6.

Id., at 752. And see, *e.g.*, *St. Louis S. F. & T. Ry. Co.* v. *Railroad Yardmasters of America*, 328 F.2d 749, 752-753 (5th Cir., 1964).

Issues as to the scope of Section 6 perhaps most often arise in the context of a contention that a proposal in a Section 6 notice is not mandatorily bargainable because it does not affect rates of pay, rules or working conditions within the meaning of that Section. Such an issue was dealt with by the court below, in an aspect of its initial opinion which dealt with the Section 6 notices served by respondent. The court there noted that the "scope of bargainability" under Section 6 "is extremely broad." App. B, at 36. The opinion of this Court in *Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330 (1960), was relied upon for that proposition. In the *Telegraphers* case, this Court upheld the bargainability of a Section 6 notice proposing that no position in existence on a specified date "will be abolished or discontinued except by agreement between the carriers and the organization" (*id.*, at 332) —thus proposing to establish a "procedure" for negotiating outside the processes of the Railway Labor Act concerning the abolition of such positions. See also, *Railway Clerks* v. *Florida E.C.R. Co.*, *supra* at 243, where this Court held that a Section 6 notice of a proposal to require six-months advance notice of layoffs and job eliminations created a major dispute under Section 6 of the Railway Labor Act and thus, in effect, that such a proposal is bargainable.

Thus, the mere fact that a Section 6 notice or an existing agreement contains provisions establishing procedures for "notices and negotiations" (App. C, at 55) does not prevent it from "affecting rates of pay, rules, or working conditions" within the meaning of Section 6 of the Railway Labor Act. Under that Act, as under the

Labor-Management Relations Act, "[w]hether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table. . . ." *Labor Board* v. *American Ins. Co.*, 343 U.S. 395, 409 (1952). In *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963), this Court upheld the validity and bargainability under Section 6 of the November 1959 notices served by the carriers. Under the proposals made in those notices, the employment of firemen in diesel freight and yard service would have been left entirely to the discretion of the carriers. We think it inconceivable that the Court would have held those notices to be non-bargainable if they had proposed, instead, that the discretion of the carriers in that regard be subject to a 10% veto by the union in the manner provided by Part II-B of the Award. Yet, the logic of the ruling below that such "procedures" are not continued by the force of Section 6 until changed in accordance with the Act would demand a ruling that a Section 6 notice proposing to establish such "procedures" is not mandatorily bargainable.[11]

C. *Under the Railway Labor Act, Disputes as to the Meaning or Application of an Arbitration Award Are for the Arbitration Board to Decide.*

Section 8(m) of the Railway Labor Act provides that "any difference arising as to the meaning, or the application of the provisions, of an award made by a board of

[11] The court below relied in part (App. C, at 54) upon the proposition that: "The history of labor relations agreements in this industry reveals that the manning work rules were expressed in terms of ultimate results, like one-conductor-and-three-brakemen, or firemen-required-on-all-freight-locomotives, and were not not formulated in terms of a methodological approach." No authority was cited for that statement, and it is factually erroneous if not limited to the precise rules referred to therein. But how-

arbitration shall be referred back for a ruling to the same board . . ." and that such ruling ". . . shall be a part of and shall have the same force and effect as [the] original award." 45 U.S.C. §158(m); see, also, 45 U.S.C. §§ 155 Third (d) and 157 Third (c). In accordance with the plain language of this statutory provision, it has long been held that disputes over the interpretation of an arbitration award made pursuant to the Act are for the arbitration board, rather than the courts, to decide. *Order of Railroad Telegraphers* v. *New York Central R. Co.*, 181 F.2d 114, 115-116 (2d Cir., 1950); *Western Air Lines* v. *Labor Commissioner*, 167 F.2d 566 (9th Cir., 1948). The rulings by an arbitration board upon such disputes are subject to impeachment by the courts, pursuant to a petition to impeach such rulings filed under Section 9 Second of the Act (45 U.S.C. § 159 Second) within the time allowed therein, if the interpretation given to the original award is so unreasonable as to constitute a new award. *Order of Railroad Telegraphers* v. *New York Central R. Co., supra* at 117; *Mid-Continent Airlines* v. *Brotherhood of Railway, Etc.*, 83 F. Supp. 976 (W.D. Mo., 1949). Otherwise, such rulings become a part of the award, as provided in Section 8(m), and are "final and conclusive on the parties," as is provided in Section 9 Second.

Heretofore, the above-stated principles uniformly have

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ever that may be, virtually the same argument was unsuccessfully urged by the unions in the *B. & O.* case in support of their contention that the November 1959 notices were invalid and non-bargainable. In that case, the unions argued that if the carriers put those notices into effect "there will be no rules concerning the assignment of employees • • • the minimum number of such assignments to a train or engine, and the classification of such assignments, • • • notwithstanding that for many years it has been the custom, practice, and usage for the collective bargaining agreements • • • to contain such rules • • •." See 310 F. 2d 503, 509 (7th Cir., 1962), aff'd, 372 U.S. 284 (1963), where the unions' complaint is so quoted.

been applied to disputes over the meaning or application of Award 282, in view of the adoption by P.L. 88-108 of the provisions of the Railway Labor Act. *Brotherhood of R. Trainmen* v. *St. Louis Southwestern Ry. Co.*, 380 F.2d 603 (D.C. Cir., 1967); *Brotherhood of Rail. Trainmen* v. *Chicago, M., St. P. & P. R. Co.*, 380 F. 2d 605 (D.C. Cir., 1967); *New York C. & St. L. R. Co.* v. *Brotherhood of Loc. Fire. & Eng.*, 358 F.2d 464 (6th Cir., 1966); *Brotherhood of Railroad Trainmen* v. *Certain Carriers, Etc.*, 349 F.2d 207 (D.C. Cir., 1965); *Brotherhood of Railroad Train.* v. *Chicago, M., St. P. & P. R. Co.*, 345 F.2d 985 (D.C. Cir., 1965). The exclusive jurisdiction of Board 282 to interpret its Award continues to exist after expiration of the Award. *Brotherhood of Rail. Train.* v. *Terminal R. Ass'n of St. L.*, 380 F.2d 584 (D.C. Cir., 1967); *New York C. & St. L. R. Co.* v. *Brotherhood of Loc. Fire. & Eng., supra.*

Petitioners vigorously dispute the interpretation given by the court below to Part II-B of the Award, as establishing a procedure for modifying the prior agreements and rules governing the employment of firemen, rather than as directly modifying those prior agreements and rules so as to establish new rules in that regard. Indeed, we believe that the language of the Award, both as originally issued and as supplemented by rulings of Board 282, is so plain that there cannot be any *bona fide* doubt about the erroneous nature of the court's interpretation. As we have noted, that interpretation was not urged by respondent until made by the court below in its supplemental opinion. Prior to that supplemental opinion, no one had doubted the fact that the firemen's provisions of the Award established new rules governing the employment of firemen, just as no one had doubted the fact that the crew-consist provisions of the Award did establish

procedures for changing the prior crew-consist rules and agreements.[12]

This difference between the two divisions of the Award is apparent from their language and structure. See pp. 6-9, *supra.* Unlike Article III, which provided that no "change" was to be made in the prior crew-consist rules "except by agreement, or pursuant to the provisions of this Award," Article II, in Paragraph A(1), provided that the prior agreements and rules "with respect to the employment of firemen (helpers) shall continue undisturbed *except as modified by the terms of this Award.*" (Emphasis added.) Thus, by the express language of the Award, it is the "terms of this Award," and not the actions taken pursuant to those terms, which modified the National Diesel Agreement and other inconsistent prior agreements and rules respecting the employment of firemen. While Article III provides for a board of adjustment to determine the changes to be made in prior crew-consist rules when the parties are unable to agree, Article II, in Paragraph B(5), itself specifies the circumstances in which firemen are to be used on diesel freight and yard crews commencing 37 days after the effective date of the Award.

The Court of Appeals relied heavily (App. C, at 53-54) upon statements in the *Opinion of Neutral Members,* 41 Labor Arbitration 680 (1963), describing the provisions for the listing and vetoing of firemen's assignments as

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[12] See pp. 12-13 *supra.* This understanding has existed from the beginning. For example, while the unions sought to impeach the Award on the ground that Article III, in establishing procedures for changing crew-consist rules rather than itself specifying such rules, failed to make a "complete and final disposition" of the crew-consist issue as required by P.L. 88-108, no such contention was made with respect to the firemen's provisions of the Award. *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B. & Q. R. Co.,* 225 F. Supp. 11, 20 (D. D.C., 1964), aff'd *per curiam,* 331 F. 2d 1020 (D.C. Cir., 1964).

"procedures."[13] But the Neutral Members did *not* state that the procedures thus established constituted procedures for modifying the prior agreements and rules, and it seems obvious that in fact they are ancillary to the new rule established in Paragraph B(5) of Article II requiring the use of a fireman on "crews designated [*i.e.*, vetoed] by the local chairmen" of the union. As we have noted (p. 7, *supra*), the Neutral Members in their Opinion expressly considered and rejected the possibility of establishing as to the firemen issue a procedure similar to that adopted as to the crew-consist issue, and they concluded that there should not "continue to be either a national rule or local rules" requiring the use of firemen on all freight and yard locomotives.

But if the statements by the Neutral Members at the time the Award was issued do give rise to any doubt about the fact that the prior agreements and rules with respect to the employment of firemen were "modified by the terms of this Award," as is expressly stated therein, that doubt should be allayed by interpretations subsequently given to the Award by Board 282 with the concurrence of its Neutral Members. The Board has repeatedly ruled that firemen need not be used on diesel freight and yard locomotives, when not required by the Award, even though the crews in question were not subject to the listing and vetoing

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[13] We note that the Neutral Members expressly stated that the "language of the award . . . is . . . intended to govern" in the event of any conflict between that language and the statements in their Opinion. *Opinion of Neutral Members, supra* at 681. The Court of Appeals also referred to statements in the Opinion of the Neutral Members noting that the Award was to expire after two years. In noting that fact, however, the Neutral Members were not purporting to decide what rules were to apply after the Award expired. Board 282 has disclaimed any jurisdiction to decide that issue, which involves an interpretation of the Railway Labor Act and P.L. 88-108 rather than an interpretation of the Award. Answer, on June 9, 1964, to SUNA Question No. III (App. G, at 83).

procedures. Those rulings, which were concurred in by the Neutral Members, have not been impeached and have become part of the Award. See pp. 27-29, *supra*.

One such situation concerns crews on extra trains, which are not subject to being listed or vetoed as Paragraphs B(1) through B(4) apply only to pool and regularly assigned crews. Board 282 has ruled that a fireman need not be used on such crews, except as may be necessary to provide engine-service employment to the protected employees entitled thereto as is required by Paragraph B(5).[14] Obviously, if the National Diesel Agreement had not been modified by the Award itself, rather than by actions taken pursuant to the provisions for listing and vetoing regular crews, firemen would have been required on all such extra trains. Even more revealing are the rulings by Board 282 concerning the use of firemen on regular crews newly-established during the three-month intervals between the service of supplemental lists as provided in Paragraph B(3) of Article II. The Board interpreted its Award as not requiring the use of firemen on such crews prior to the service of the next supplemental list (and, of course, not thereafter unless vetoed), except where necessary to provide engine-service employment to protected employees entitled thereto under the Award as required by Paragraph B(5).[15] That ruling made unmistakably clear that the listing and vetoing procedures in Paragraphs B(1) through B(4) are ancillary to the new rule governing the employment of firemen established by Paragraph B(5), rather than a means of establishing a new rule modifying

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[14] *E.g.*, Answer, on May 17, 1964, to BLF&E Question No. 9; Answer, on September 16, 1964, to BLF&E Question No. 79; Answer, on September 16, 1964 to BLF&E Question No. 105—set forth in App. G, at 80-82.

[15] Answers, on May 17, 1964, to Carriers Question No. 2 under Section II—Part B(3), and to BLF&E Question No. 6(b)—set forth in App. G, at 80.

the National Diesel Agreement. Otherwise, the National Diesel Agreement would have applied to require the use of a fireman on all such newly-established crews until such time as they were listed without being vetoed.

We believe that these rulings conclusively establish that the Award itself, rather than actions taken pursuant to procedures established by the Award, modified the National Diesel Agreement and established new rules governing the employment of firemen. Furthermore, we think it entirely clear, from rulings by Board 282 as well as from the Award as originally issued, that the prior agreements and rules were modified in states having valid so-called "full crew" laws to the same extent and in the same manner as they were modified in all other states.

In *Engineers* v. *Chicago, R. I. & P. R. Co.*, 382 U.S. 423 (1966), this Court held that P.L. 88-108 and Award 282 did not pre-empt state "full crew" laws, and that the Arkansas law there involved would, unless otherwise unconstitutional,[16] have to be obeyed even though inconsistent with the Award, just as it had to be obeyed even though inconsistent with a collective bargaining agreement. See, *e.g., Missouri Pacific R. Co.* v. *Norwood*, 283 U.S. 249 (1931). There was no issue in that case as to whether the National Diesel Agreement was or could be modified in "full crew" law states either by or pursuant to the Award and this Court, of course, did not rule upon any such issue. Indeed, it had already been conclusively established that the Award did modify the prior agreements and rules in such states as well as in all other states.

This was indicated by the fact that the Award as

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[16] Following the remand by this Court, the three-judge District Court held that the Arkansas law is unconstitutional under the Due Process Clause in the Fourteenth Amendment and the Commerce Clause in Article I, Section 8 of the Constitution. Opinion and Decree of October 2, 1967 in Civil No. H.S. 944 (W.D. Ark.).

originally issued did not contain any exception for states having valid "full crew" laws, and was definitely settled by Board 282 in its Answer, on May 17, 1964, to Carriers' Question No. 5 under Section II—Part B(1) and B(2), as follows: "The obligations and rights of the parties with respect to the listing of jobs and the exercise of the veto under Section II, Parts B(1), B(2), B(3) and B(4) of the Award are the same in the so-called 'full crew law states' as in all other states." See App. G, at 83-84. That interpretation of the Award was not impeached, and thus became a part of the Award and "final and conclusive" on the parties thereto. See pp. 27-28, *supra*.

Under the Award as thus definitively interpreted, the National Diesel Agreement was modified even if the Award merely established a procedure for modifying that Agreement. The parties stipulated (JA 130) that some carriers had listed crews under Paragraphs B(1) and B(3) during the period of the Award in "full crew" law states, and the court below held in its supplemental opinion that when crews were listed without being vetoed a new "work rule" was established which (App. C, at 56) "does not require a fireman on that crew even though for one reason or another the carrier had not removed or transferred that fireman by the end of the effective period of the Award." When this was pointed out to the court in the carriers' petition for rehearing and for clarification, however, the court amended its supplemental opinion to state (App. E, at 65) that:

> "The Board authorized the carriers to list jobs for blanking, and thus provide a classification 'when and if such full crew laws are amended or repealed.' Answer of May 17, 1964, to Carriers' Question No. 5 under Section II—Part B(1) and B(2). But this conditional blanking was only available as an advance

procedure made fruitful if the necessary condition materialized during the 2-year lifetime of the Award. See *Opinion of Neutral Members,* quoted *supra,* 41 Lab. Arb. at 681. . . ."

We submit that there is no basis whatsoever in the Answer to Carriers' Question No. 5 for the view that the modifications of the prior rules and agreements were intended by Board 282 to be "conditional" upon repeal of the "full crew" law within the two-year period of the Award. And, the statement by the Neutral Members cited by the court below provides no basis for such an interpretation.[17]

In short, we believe that the court's interpretations of the Award are inconsistent with the language of the Award as originally written and as interpreted by Board 282. Plainly, the court's interpretations are not so obviously correct as to be beyond *bona fide* dispute. Those interpretations are disputed by petitioners, and, as we have shown, under the Railway Labor Act as adopted by P.L. 88-108, primary jurisdiction to resolve such disputes is in Board 282 rather than the courts. In its order denying the petition for rehearing and for clarification (App. E, at 64-65), the court appeared to recognize that its interpretations arguably "are inconsistent with the understanding of Board 282 as to the proper meaning and applicability of its award," and suggested that Board 282 might request leave to make an *amicus* submission with respect to that

[17] The reference is to the following statement: "The Board's award will remain in force only two years. Within that time the effect of attrition may be such that the number of firemen or train crew jobs actually eliminated may be comparatively small." That statement merely recognizes that the rules established by the Award may be changed under the Railway Labor Act after the expiration of the Award. Certainly, it does not differentiate between "full crew" law states and other states or suggest that modifications of the prior rules and agreements in "full crew" law states were intended to be "conditional" upon repeal of that law within the two-year period.

issue. If Board 282 had made an *amicus* submission or determined not to so do because it agreed with the court's interpretations of its Award, that procedure might have been satisfactory even though unorthodox. But when the court was informed that the Board would decline to request leave to make an *amicus* submission without considering whether it agreed with the court's interpretations of the Award, under the "discretion" given to it by the procedure adopted by the court, then the court should have stayed its proceedings pending answers by the Board to questions submitted by the parties—as petitioners requested (see p. 14, *supra*)—or adopted some other appropriate procedure for assuring that the disputed issues as to the meaning of the Award are decided by the Board rather than by the courts.

D. *Under the Railway Labor Act, the Purpose and Effect of an Expiration Date in A Collective Bargaining Agreement or Arbitration Award Is to Preclude the Parties from Being Required Under the Act to Bargain Prior to Such Expiration Date about Proposed Changes in Such Agreement or Award.*

As we have shown (pp. 20-27, *supra*), the expiration of a collective bargaining agreement or arbitration award under the Railway Labor Act does not terminate the rights and duties of the parties pursuant to such agreement or award. Thus, the purpose and effect of including an expiration date in such an agreement or award is not to terminate the rights and duties of the parties thereunder. Rather, the purpose and effect of including an expiration date is to establish a moratorium period in which the parties to the agreement or award cannot be compelled to bargain under the Railway Labor Act concerning proposed changes in the agreement or award. Such bargaining can be compelled only after the expiration date.

In *Flight Engineers' Inter. Ass'n* v. *American Airlines, Inc.*, 303 F.2d 5 (5th Cir., 1962), appeal dismissed by stipulation, 314 F.2d 500 (5th Cir. 1963), for example, the carrier and union had entered into an agreement which was to terminate five years from its effective date. On the same day, they entered into a supplemental agreement which provided that "written notice of an intended change in any provision could be served 30 days after the first anniversary of the first turbine aircraft in scheduled passenger service." *Id.*, at 7. The union served a Section 6 notice after the date specified in the supplemental agreement, but "the Carrier took the position that a number of [the union's] demands were actually covered by the terms of the basic agreement, and therefore not open for bargaining for 5 years.", *Id.*, at 7.

The trial court enjoined a strike by the union pending a determination by an adjustment board, under Section 3 of the Railway Labor Act (45 U.S.C. § 153), of whether or not the union's demands were outside the scope of the reopening clause in the supplemental agreement, and the Fifth Circuit affirmed. In so doing, the Fifth Circuit rejected a contention that the carrier could be compelled to bargain prior to the expiration of the basic agreement even if the Section 6 proposals related to matters covered by that agreement rather than by the supplemental agreement, stating (*id.*, at 13) that:

> "Again, without anticipating what the decision of the System Board of Adjustment on the merits (assuming it has jurisdiction) must be, this analysis rests on the premise that the law as such will give vitality to the duration clauses and correlative reopening clauses of labor contracts. The Union argues in effect that since no one in 1958 knew all the problems which would arise in the operation of jets, the Union could not

foreclose its statutory right—and duty—to bargain when, and as, and as often as needed. But any such rule leads either to chaos or a demolition of the concept of industrial peace through labor contracts fairly arrived at."

So, too, in *Capitol Airways, Inc.* v. *Air Line Pilots Ass'n*, 41 CCH Labor Cases ¶16,739 (MD Tenn., 1961), the carrier and union executed an agreement containing a provision that it was to expire on June 30, 1961. The plaintiff contended that this was a "valid contract" and hence that it had "no duty to bargain with the defendant" union in regard to the employees covered by the contract "until the contract expires on June 30, 1961." The court stated that if the agreement were valid it follows "necessarily that the plaintiff is not required to bargain [with the union as representative of those employees] with respect to their terms and conditions of employment until the expiration of such agreement on June 30, 1961;" held that the agreement was valid, and granted a summary judgment for the plaintiff. See, also, *Rutland Ry.* v. *Brotherhood of Loc. Eng.*, 307 F.2d 21, 36 (2d Cir., 1962), where the court stated that: "We do not say that the issue in the present case is not a bargainable one. We have no doubt that the brotherhoods, upon the expiration of the existing agreements, may require the railroad to bargain. . . ."

Insofar as we are aware, there were no decisions to the contrary prior to the decision by the court below. While that court correctly held that the carriers were not required to bargain prior to the expiration of the Award upon Section 6 notices served by one of the crew-consist unions, it erroneously held that the carriers were required to bargain prior to the expiration of the Award upon the Section 6 notices served by respondent and by another crew-consist union. App. B, at 24-34. The distinction

drawn by the court below was that the notices served by the one union proposed changes in crew-consist rules to become effective during the period of the Award, while respondent's notices proposed changes in firemen's rules to become effective the day after the expiration of the Award. Although the attempt by the one union to ignore the Award altogether undoubtedly emphasizes the impropriety of its endeavor to proceed under the Railway Labor Act during the period of the Award, we submit that the mere fact that respondent specified an effective date immediately following the expiration of the Award did not entitle it to require the carriers to bargain over its Section 6 notices prior to the expiration of the Award.

In holding to the contrary, the court below relied heavily (App. B, at 25-26) upon testimony during the hearings upon the Administration's bill to the fact that bargaining upon the 1959 and 1960 Section 6 notices would continue during the period of I.C.C. regulation as required by that bill. But, as we have shown (pp. 16-20, *supra*), the Administration's bill was revised to eliminate the requirement for such bargaining and the Congress, instead, provided in P.L. 88-108 for a "complete and final disposition" of the 1959 and 1960 notices through arbitration in accordance with the Railway Labor Act. And, as we have further demonstrated (pp. 36-38, *supra*), the purpose and effect of an expiration date in an agreement or arbitration award under the Railway Labor Act is to assure that one party cannot reopen the dispute so as to compel further bargaining under the Railway Labor Act prior to that termination date. Such a moratorium was particularly appropriate here in order to afford a substantial "cooling off" period before the dispute could be renewed and to assure that the Report of the National Joint Board evaluating the experience under the Award (see pp. 9-10,

supra) would be available for use in bargaining upon new Section 6 notices.

But for this aspect of the "time-tested provisions of the Railway Labor Act" which the Congress adopted in P.L. 88-108, the Congress could not have been assured of avoiding the possibility, which it found to be an objectionable feature of the Administration's bill (see p. 18, *supra*), of being faced with a renewed threat of a railroad strike and a consequent demand for further legislative intervention, within a relatively short time. Otherwise, the unions could have placed themselves in a position to strike immediately upon expiration of the Award by exhausting the procedures of the Railway Labor Act during the period of the Award with respect to Section 6 proposals such as those served by the BRT. Plainly, this was not intended by the Congress.

E. *The Issues Involved Are Important and Should Be Reviewed by this Court.*

We believe we have demonstrated that several aspects of the decision below are based upon constructions of the Railway Labor Act that are erroneous and that conflict in principle with views expressed by this Court or by other courts of appeals. The rulings below with respect to the scope of Section 6, the respective jurisdictions of the courts and arbitration boards to resolve disputes over the interpretation of arbitration awards, and the effect of an expiration date in a collective bargaining agreement or arbitration award are important to the administration of the Railway Labor Act in general as well as to the decision of this case.

Even as limited to this case, the aspects of the decision below which petitioners seek to have reviewed are of great importance to the parties and to the public. The Court of

Appeals recognized that its ruling that firemen must be used on "new runs" created after the expiration of Award 282 "may be turning the clock back to an era that two presidential boards and the Neutral Members have agreed is technologically outdated . . ." (App. C, at 56). The Presidential Railroad Commission, Emergency Board No. 154 and Board 282 all found, upon the basis of extensive records, that firemen were not needed on most diesel freight and yard engines. Although the carriers served their Section 6 notices proposing to eliminate any requirements for the use of firemen on such locomotives in November of 1959, it was March of 1964 before they were in a position to commence eliminating firemen from some crews. Even now, the number of firemen on freight and yard crews has not been reduced to the 10% that Board 282 considered to be more than adequate to take care of all situations in which the use of a fireman may be justified by requirements of safety or efficiency of operations, because of the necessity of providing engine-service employment to certain existing firemen until they are removed by natural attrition.

To require the carriers to use firemen on all "new runs" created since March 30, 1966 until such time as the time-consuming procedures of the Railway Labor Act once again can be exhausted (and perhaps until arbitration once more is had under a statute such as P.L. 88-108) certainly should not be required in such circumstances unless this Court finds that to have clearly been intended by the Congress. Moreover, the court below did not define what constitutes a "new run" for purposes of its decision, and that term is not defined by the Railway Labor Act, by P.L. 88-108 or by the Award. One can foresee a multitude of controversies over that issue and a flood of claims on behalf of individual firemen based upon contentions that the failure of a carrier to use a fireman on a particular

crew, even though permitted by the judgment of the District Court, was erroneous because that crew operated a "new run" within the meaning of the decision by the Court of Appeals. We submit that the clock should not be turned back in this manner without review by this Court.

Furthermore, two states—Oregon and Washington—have repealed "full crew" laws requiring the use of a fireman since the expiration of the Award,[18] and others may do so. Unless it can be shown that those statutes were unconstitutional, the decision below has the effect of continuing them in existence despite their repeal, insofar as they required the use of firemen. The clock will have been turned back not only as to "new runs" but as to all crews to which such laws applied. We should note, also, that the importance of the issues raised herein—even if limited to the immediate effect of the decision below upon the parties and the public—is enhanced by the fact that similar rulings were made with respect to some of those issues in the context of the crew-consist provisions of Award 282, which rulings also are pending before this Court on petition for writ of certiorari in No. 863. In addition, the unions have sought review of other aspects of the decision below both as to the firemen's (No. 859) and as to the crew-consist (Nos. 861 and 862) provisions of the Award. While the carriers, in responding to the unions' petitions, expect to demonstrate that the rulings adverse to the unions were clearly correct, the considerations involved are closely related to the considerations urged herein and certainly the Court should not grant the unions' petition without also granting this petition and the petition in No. 863.

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[18] Oregon Laws, 1965, Chapter 462, repealed the Oregon "full crew" law effective January 1, 1967. The Washington "full crew" law was repealed effective December 8, 1966. Laws of Washington, 1967, Chapter 2, Section 1.

Conclusion

For the reasons stated above, this petition for writ of certiorari should be granted.

Respectfully submitted,

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